(9)

No. 04-169

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the limitations period provided in 31 U.S.C. 3731(b)(1) applies to a claim for retaliatory discharge under the False Claims Act, 31 U.S.C. 3730(h).

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INTEREST OF THE UNITED STATES

This case concerns the limitations period for an employee to bring a civil action for retaliation under the False Claims Act, 31 U.S.C. 3730(h). Congress enacted the anti-retaliation provisions of Section 3730(h) as part of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. A chief purpose of those amendments was to enlist private individuals in the battle against fraud under federal programs, including by encouraging them to investigate fraud and to bring meritorious *qui tam* actions on behalf of the United States. Section 3730(h) promotes that purpose by protecting those who help to ferret out fraud from retaliation in their employment. The United States has a significant interest in ensuring that the statute of limitations is construed in a manner that furthers this important Congressional policy.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, is "the primary vehicle by the Government for recouping losses

suffered through fraud." H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986) (House Report). The FCA prohibits the making of false or fraudulent claims to the United States, 31 U.S.C. 3729(a)(1), as well as a variety of related deceptive practices involving government funds and property, 31 U.S.C. 3729(a)(2)-(7). The Act imposes civil penalties and treble damages in the event of a violation. 31 U.S.C. 3729(a).

In 1986, Congress revised and updated the FCA in the False Claims Amendments Act of 1986 (FCA Amendments), Pub. L. No. 99-562, 100 Stat. 3153, to make the statute a "more useful tool against fraud in modern times." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (Senate Report)). One principal purpose of this legislative overhaul was to "increase[] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." Senate Report 2; see *Cook County*, 538 U.S. at 133 (FCA Amendments "enhanced the incentives for relators to bring suit"). Thus, the FCA Amendments expanded the potential recovery available to relators, relaxed the bar against *qui tam* actions based on information in the government's possession, and authorized relators to maintain an active role in the litigation even if the government intervenes. See § 3, 100 Stat. 3154-3157.

As amended, Section 3730 of the FCA creates three causes of action. Section 3730(a) provides that, if the Attorney General finds that a person has violated or is violating 31 U.S.C. 3729—the section of the FCA that specifies substantive prohibitions regarding false claims and the resulting liability for them—the Attorney General may bring a civil action against the person. 31 U.S.C. 3730(a). Section 3730(b) provides that a *qui tam* relator may bring a civil action for a violation of Section 3729 "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). Finally, Section 3730(h) provides a cause of action for an employee who is retaliated against by her employer for investigating, bringing,

or otherwise assisting in bringing an action under Section 3730. 31 U.S.C. 3730(h). In such an action, the employee is entitled to all the relief necessary to make her whole, including reinstatement, two times the amount of back pay plus interest, any special damages, and attorneys' fees and other litigation costs. *Ibid.*

When a relator files a *qui tam* action under Section 3730(b), as amended, the complaint must be filed under seal, and the relator must provide a copy of the complaint and supporting information to the United States, which has 60 days to decide whether to intervene in the suit, 31 U.S.C. 3730(b)(2), although that 60-day period may be extended for good cause shown, 31 U.S.C. 3730(b)(3). If the government intervenes, it shall have the primary responsibility for prosecuting the action, although the relator has a right to continue as a party in the litigation, subject to certain limitations. 31 U.S.C. 3730(c). If a *qui tam* action results in a recovery of damages and civil penalties, the recovery is divided between the government and the relator, with the relator receiving a maximum of 30% of the total award. 31 U.S.C. 3730(d).

The Act's anti-retaliation provision was added in 1986. 31 U.S.C. 3730(h). In the hearings that preceded the 1986 amendments, the responsible committees of the House of Representatives and the Senate heard extensive testimony regarding the unwillingness of potential whistleblowers to expose fraud against the government for fear of reprisal.[1] Congress therefore provided the new federal right of action "to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers', as well as assure those who may be considering exposing fraud that

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[1] See Senate Report 4-6; *False Claims Reform Act: Hearing Before the Subcomm. on Admininistrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 48-101 (1985); *False Claims Act Amendments: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 371-372, 387, 392-416 (1986).

they are legally protected from retaliatory acts." Senate Report 34. Section 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Congress also amended the FCA's statute of limitations as part of the 1986 revisions. As amended, Section 3731(b) provides that "[a] civil action under section 3730" must, as a general matter, be brought within "6 years after the date on which the violation of Section 3729 is committed." 31 U.S.C. 3731(b)(1). The FCA also provides an alternative limitations provision for circumstances in which the violation was initially concealed, allowing suit to be brought within "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. 3731(b)(2).

2. a. Respondent Karen T. Wilson was formerly employed as a secretary for petitioner Graham County Soil and Water Conservation District. J.A. 17. In December 1995, respondent reported to the United States Department of Agriculture (USDA) what she believed to be fraud by petitioners in connection with a federal disaster relief program known as the Emergency Watershed Protection Program, administered by the Natural Resources Conservation Service (NRCS)—an agency of USDA. J.A. 17, 25-26. Shortly thereafter, respondent met with agents of USDA's Office of Inspector General (OIG) and their state counterparts. J.A. 26-27. With respondent's assistance, the federal and state agencies undertook investigations of respondent's allegations, which continued through 1998. J.A. 27.

b. On January 25, 2001, respondent filed suit against petitioners in the United States District Court for the Western District of North Carolina. J.A. 3, 11. The complaint alleges a *qui tam* claim, pursuant to Section 3730(b), for violations of Section 3729, and a claim of retaliatory discharge under Section 3730(h). J.A. 30-33. According to the allegations of the complaint, petitioners made numerous false claims for payments funded by NRCS under the Emergency Watershed Protection Program. J.A. 17. Among the false claims respondent witnessed were claims for payment pursuant to no-bid or non-existent contracts and for work that had not been performed. J.A. 18-20. Petitioners allegedly made similar false claims under agricultural programs administered by the State of North Carolina that were subsidized by federal funds. J.A. 20-24.

The complaint also alleges that respondent was subjected to workplace retaliation from 1996 to 1997, resulting in her constructive discharge. The Chairman of the Graham County Commission threatened to terminate respondent's position if she did not stop assisting the federal investigation. J.A. 28. Respondent received numerous threats against her and her family, and on one occasion a gun barrel

was left on the desk in her office. *Ibid.* Those acts of harassment so disturbed respondent that she was forced to take medical leave in 1996. J.A. 29-30. Although respondent returned to work, the harassment continued, and she was ultimately forced to resign on March 7, 1997. J.A. 30.

The United States declined to intervene in the *qui tam* action, J.A. 3, and respondent proceeded with the litigation.

c. On petitioners' motion, the district court dismissed respondent's retaliation claim as untimely. Pet. App. 67a-70a. The court held that retaliation claims under Section 3730(h) are not governed by the FCA's six-year limitations period but instead are subject to the most closely analogous state-law statute of limitations. The court determined that North Carolina's three-year limitations period for wrongful discharge was most analogous, *id.* at 69a, and held that respondent's retaliation claim, which had been filed three years and ten months after her constructive discharge, was therefore time-barred, *id.* at 70a. The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 85a-86a.

d. A divided panel of the Fourth Circuit reversed. Pet. App. 1a-41a. The majority held that, because the phrase "an action under § 3730 * * * necessarily includes an action for retaliation under § 3730(h)," the "effect of the language [of 31 U.S.C. 3731(b)(1)] as written" is to require that a retaliation action under Section 3730(h) be brought within six years of the date on which the underlying violation of Section 3729 was committed. Pet. App. 5a-6a.

The court of appeals considered petitioners' arguments and found that none of them succeeded in rendering the text of Section 3731(b)(1) ambiguous. Pet. App. 13a. According to the court, Section 3731(b)(1)'s identification of the underlying substantive violation of Section 3729 as the triggering event to commence the running of the limitations period did not, as petitioners contended, impliedly limit its scope to actions by the Attorney General or a *qui tam* relator under

Section 3730(a) or (b) based on a substantive violation of the Act, because an actual or potential Section 3729 violation is also central to a retaliation suit under Section 3730(h). *Id.* at 14a. The court noted from the legislative history that Congress had viewed the anti-retaliation protections of Section 3730(h) as closely related to the whistleblower provisions of Section 3730(b), and that Congress had, in fact, rejected a proposal to place the retaliation cause of action in a separate section, in favor of locating it within Section 3730, where it would be subject to the limitations provision in 31 U.S.C. 3731(b) applicable to a "civil action under section 3730." Pet. App. 15a-16a.

The court of appeals also rejected petitioners' argument that it would be absurd to apply Section 3731(b)(1) to retaliation claims because the six-year period from the date of the violation could end before the retaliation occurred and therefore before the cause of action for retaliation occurred. The court noted that this could happen, for example, if the employee first reported the violation of Section 3729 shortly before the six-year period expired, or the employer chose to wait out whatever portion of the six-year period remained before taking retaliatory action. Pet. App. 19a. The court observed that such cases were certain to be the exception, rather than the rule, *id.* at 20a, and that in particular circumstances—such as an employer's deliberate delay in retaliating until after the limitations period had run—equitable doctrines of estoppel might apply, *id.* at 20a-21a. Nor, the court said, would application of Section 3731(b)'s limitations period require a retaliation plaintiff to prove an actual violation of Section 3729 in order to assert a valid and timely retaliation claim, because the timeliness of an action based on retaliation depends on whether the suit was filed within six years of the alleged violation of Section 3729, not on proof of an actual violation. *Id.* at 22a-24a.

Finally, the court of appeals noted that the application of state statutes of limitations to FCA retaliation claims, as ad-

vocated by petitioners, would undermine Congress's purposes in several respects. The court explained that shorter state limitations periods, some as short as 180 days, would be too abbreviated for a plaintiff to "marshal the evidence" necessary to file a retaliation claim. Pet. App. 24a-25a. Indeed, the court continued, uncertainty regarding which State's law, out of potentially numerous relevant jurisdictions, governed, and which of a particular State's many statutory periods was most analogous, would make it very difficult for many *qui tam* relators to determine the deadline for filing a retaliation claim. *Id.* at 25a-27a. Thus, the court concluded, the application of state law would undermine the protection Congress intended Section 3730(h) to provide for whistleblowers. *Ibid.*

Judge Wilkinson dissented. Pet. App. 28a-41a. He would have held that Section 3731(b)(1)'s reference to the "violation of section 3729" as the date on which the limitations period starts to run impliedly excludes suits under Section 3730(h) from the provision's scope. *Id.* at 31a. The dissent also found it incongruous that the limitations period could run before the retaliatory act took place. *Ibid.* Accordingly, Judge Wilkinson would have borrowed the most closely analogous period under state law. *Id.* at 39a.

SUMMARY OF ARGUMENT

Section 3731(b) of the FCA provides the limitations period for "[a] civil action under section 3730," 31 U.S.C. 3731(b), a phrase that, by its terms, plainly encompasses each of the three causes of action created by Section 3730, including a civil action under subsection (h) of Section 3730 for retaliation. There is a strong presumption that Congress means what it says in statutes, and there are no reasons to disregard that presumption here. Rather, the broader context and purposes of the FCA confirm that Section 3731(b) means what it says.

Congress consistently used the phrase "action under section 3730" throughout the provisions governing the jurisdictional and procedural aspects of claims under the FCA. By contrast, in the more substantive context of Section 3731(d), Congress specifically limited the preclusive effect of guilty and nolo contendere pleas in criminal prosecutions for false or fraudulent claims to "any action * * * brought under *subsection (a) or (b)* of section 3730." 31 U.S.C. 3731(d) (emphasis added). Congress's express exclusion of retaliation claims from Section 3731(d), and the absence of such an exclusion in Section 3731(b), confirms that Congress intended Section 3731(b) to apply to retaliation claims.

Moreover, by making retaliation actions under Section 3730(h) subject to the same rules governing actions under the other subsections of Section 3730, Congress furnished a mechanism for retaliation claims and substantive FCA violations to be litigated together. That practice furthers the FCA's statutory scheme, which is designed to allow potential relators and the government to engage in a full investigation of the case without the defendant becoming aware of it. In contrast, if short state limitation periods—some as short as 90 days—were to apply, a relator would often have to bring her retaliation claim separately, or to file her *qui tam* complaint prematurely before her investigation was complete. In either event, the enforcement mechanisms of the FCA would be undermined. Moreover, prior disclosure of the fraud allegations in a retaliatory discharge suit would raise questions concerning the ability of the person to bring a subsequent *qui tam* suit, due to the FCA's bar against a *qui tam* suit where there has been a public disclosure of the underlying information, 31 U.S.C. 3730(e)(4). By establishing a single statute of limitations for both retaliation and *qui tam* claims, Section 3731(b) avoids these problems.

ARGUMENT

THE FALSE CLAIMS ACT'S SIX-YEAR STATUTE OF LIMITATIONS APPLIES TO ANY "ACTION UNDER SECTION 3730," WHICH, BY ITS TERMS, ENCOMPASSES A RETALIATION ACTION UNDER SECTION 3730(h).

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). This is not a case in which the statute does not plainly provide for a statute of limitations for an action, like respondent's, brought under Section 3730. Section 3731(b) of the False Claims Act provides the limitations period for "[a] civil action under section 3730," 31 U.S.C. 3731(b), a phrase that manifestly includes an action under subsection (h) of Section 3730. That should end the matter. "[W]hen 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). There is certainly nothing absurd about a uniform federal limitations rule for all FCA actions, which permits ease of application and ensures that an employee retaliated against for investigating a false claim could bring her retaliation action together with the related *qui tam* suit.

A. The FCA's Text Unambiguously Provides That Retaliation Claims Under Section 3730(h) Are Governed By The Limitations Period In Section 3731(b)

The application of Section 3731(b)'s limitations period to all actions under Section 3730, including retaliation claims under Section 3730(h), could hardly be clearer. The burden

thus rests with petitioners to show why that uniform limitations period is, in fact, absurd.

Petitioners urge several theories why, in their view, the structure and context of the FCA suggest an implied limitation on the scope of Section 3731(b). See Pet. Br. 11-15. None of those arguments, however, overcomes the central point that a retaliation action under 31 U.S.C. 3730(h) is "[a] civil action under section 3730," and, thus, comes within the plain text of the statute of limitations provided in Section 3731(b). And none comes close to the kind of showing of absurdity required for a court to conclude that Congress, in fact, provided *no* federal statute of limitations for a Section 3730(h) action, despite its apparent provision of a clear statute of limitations for *all* Section 3730 actions. There is no reason why Congress would have used the various modes of indication suggested by petitioners to signal an implied exclusion of Section 3730(h) claims from the scope of Section 3731(b) when it could have done so succinctly and directly by expressly limiting Section 3731(b) to an action "under subsection (a) or (b) of section 3730." In fact, Congress used precisely that limiting language in another subsection of Section 3731. See 31 U.S.C. 3731(d) (limiting the preclusive effect of nolo contendere and guilty pleas in any criminal proceeding charging false or fraudulent statements to actions brought "under subsection (a) or (b) of section 3730"). Where, as here, Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2754 n.9 (2004) (quoting 2A Norman Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)). None of petitioners' theories overcomes that presumption, let alone the plain text of Section 3731(b).

1. Petitioners contend that it is permissible to read an implied limitation into the text of Section 3731(b) because of what they view as "Congress' lack of precision in drafting."

Pet. Br. 14. Petitioners maintain that "the phrase 'an action under section 3730' means different things" in different provisions of the FCA and that the phrase is therefore "ambiguous." *Ibid.* It is true that some FCA provisions that use the phrase "action under section 3730" may not have relevance to an action under Section 3730(h). But that is because of other language within those provisions that makes clear that they do not apply. Thus, the use of the general phrase "action under section 3730" in various places in the FCA does not authorize the courts to read an implied exclusion of Section 3730(h) actions into provisions that do, by their terms, apply to such suits.

A review of the FCA's use of the phrase "action under section 3730" reveals that Congress consistently used that general phrase when discussing jurisdictional or procedural aspects of claims under the FCA. Congress's reference to all actions under Section 3730 when establishing the procedural rules that would govern them reflects its recognition that, because of the interrelatedness of the various causes of action created by Section 3730, they would often be litigated together. Thus, when Congress established a nation-wide subpoena power, 31 U.S.C. 3731(a), a statute of limitations, 31 U.S.C. 3731(b), a standard of proof, 31 U.S.C. 3731(c), a rule of venue, 31 U.S.C. 3732(a), and a rule of supplemental jurisdiction, 31 U.S.C. 3732(b), for FCA actions, it uniformly made those provisions applicable to all "action[s] under section 3730." The general applicability of those procedural rules ensures that a *qui tam* relator will be able to litigate her substantive FCA action under Section 3730(b) in the same manner as the Attorney General may litigate his substantive FCA action under Section 3730(a), and that the relator will be able to litigate any retaliation claim she may have under Section 3730(h) together with and subject to the same procedural rules as her action under Section 3730(b).

In contrast to Congress's uniform extension of these procedural provisions to any "action under Section 3730," when

Congress addressed the more substantive rule concerning the collateral estoppel effect of a criminal conviction on a related claim under the FCA, Congress expressly limited the preclusive effect to "any action * * * brought under *subsection (a) or (b)* of section 3730." 31 U.S.C. 3731(d) (emphasis added). Like Section 3731(b), Section 3731(d) was enacted as part of the 1986 FCA Amendments. See § 5, 100 Stat. 3158. Section 3731(d)'s careful delineation of its scope as reaching only an action under "subsection (a) or (b) of section 3730," in contrast to the Amendments' use elsewhere of the broader phrase "action under section 3730," demonstrates both that Congress recognized that the causes of action under subsections (a) and (b) are only a subset of those available under Section 3730, and that Congress knew how to exclude actions under Section 3730(h) when it wished to do so. Because Congress expressly excluded retaliation claims from Section 3731(d), but did *not* do so in Section 3731(b), the obvious inference is that Congress intended Section 3731(b) to mean what it says. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[2]

Petitioners note that Section 3731(c) provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evi-

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[2] Of course, Congress presumably excluded retaliation actions under subsection (h) of Section 3730 from the scope of Section 3731(d) because it concluded that pleas in criminal cases involving false or fraudulent statements would have no logical application in actions based on retaliatory conduct by an employer. The absence of such an exception in Section 3731(b) thus reinforces the conclusion that Congress made no such judgment about the FCA's general statute of limitations.

dence." Pet. Br. 12 (emphasis omitted). Petitioners reason from this provision that because "[t]he only action that the federal government can bring under the [FCA] is an action by the Attorney General under section 3730(a)," the phrase "action * * * under section 3730" in Section 3731(c) excludes retaliation claims, and the Court is therefore free to read that phrase to exclude retaliation claims in other provisions as well. *Id.* at 12-13. But Section 3731(c) is inapplicable to retaliation claims not because the phrase "*action * * * under section 3730*" actually means only a subset of Section 3730 actions, but rather because *other* language in Section 3731(c) refers solely to the United States' obligations. Cf. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253-254 (2004). As a result, Section 3731(c), by its terms, applies only to Section 3730 actions *that are brought by the United States*. Section 3731(c) therefore has no application to *qui tam* actions brought by a relator under Section 3730(b) or a retaliation claim under Section 3730(h).[3] Yet that does not mean that the phrase "action under section 3730" actually means only Section 3730(a) claims elsewhere in the FCA, including the statute of limitations in Section 3731(b).[4]

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[3] Although, as discussed in the text, Section 3731(c) has practical consequences only with respect to a suit brought by the United States, its purpose was to bring uniformity to the procedural rules governing actions under Section 3730, not to introduce disparities among them, as petitioners suggest (Br. 12-13). See Senate Report 31 (indicating that the purpose of Section 3731(c) was to repudiate the view, which had been expressed by some courts, that, unlike qui tam plaintiffs, the United States, as sovereign, must meet a heightened standard of proof of fraud in FCA actions).

[4] Petitioners' reliance on 31 U.S.C. 3732(b) suffers from the same flaw. Section 3732(b) establishes supplemental jurisdiction over State and local claims to recover for false claims "if the action arises from the same transaction or occurrence as an action brought under section 3730." Petitioners contend (Br. 13) that here the phrase "an action brought under section 3730" clearly does not encompass a retaliatory discharge action under Section 3730(h) because retaliation is personal to the employee and thus would not be part of the same transaction or occurrence that would give rise to a state false claims action. Again, the likely inapplicability of Section 3732(b) to most (or we may even assume all) retaliation actions under Section 3730(h) stems not from an implied limitation in the phrase "action brought under section 3730," but from the other language in Section 3732(b) referring to the same "transaction or occurrence."

2. Petitioners maintain that the identification of a "violation of section 3729" in Section 3731(b)(1) as the event that commences the running of the limitations period excludes actions under Section 3730(h) from Section 3731(b)'s scope because "Section 3729 * * * 'strictly addresses false claims, not retaliation claims.'" Pet. Br. 9 (quoting *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998)). While it is true that Section 3729 does not address retaliation claims under Section 3730(h), the converse is not true: Section 3730(h), which establishes the retaliatory discharge cause of action, *does* have a nexus to—and in this sense "subsumes" (Pet. App. 14a)—a violation of Section 3729. A necessary element of a retaliation claim under Section 3730(h) is that the plaintiff was engaged in protected conduct relating to "an action filed or to be filed under this section." 31 U.S.C. 3730(h). Thus, *any* "civil action under section 3730," including a retaliation action under Section 3730(h), must at some point involve at least an alleged or suspected violation of Section 3729. In this respect, the situation for a retaliation action is parallel to when the Attorney General or a relator brings an action for a substantive FCA violation under Section 3730(a) or (b). The requirement in Section 3731(b)(1) that the action be brought within six years of the violation of Section 3729 must be understood to refer to the conduct that is alleged to be a violation of Section 3729. The fact that Congress identified a Section 3729 violation as triggering the limitations period in Section 3731(b)(1) therefore does not imply that Section 3731(b) is inapplicable to retaliation claims.

Petitioners further contend (Br. 19) that "[i]f Congress had intended a retaliatory discharge action to be governed

by a six year limitations period, there would have been no reason for Congress to have [amended the pre-1986] words 'from the date the violation is committed.'" It is very odd to think, however, that Congress chose to exclude retaliation claims from Section 3731(b) in so cryptic a manner as adding the words "of Section 3729" to Section 3731(b)(1) when it could have accomplished that result more simply and clearly by expressly limiting Section 3731(b) to actions "under subsection (a) or (b) of Section 3730," as Congress did in Section 3731(d). See p. 13, *supra*.

Moreover, petitioners' argument overlooks that leaving the pre-1986 limitations period unchanged, without tying the limitations period to the underlying violation of Section 3729, would have created a different limitations period that would allow FCA retaliation claims to be brought long after the underlying fraud had grown stale. That would have frustrated Congress's intent to have retaliation claims litigated promptly, and to encourage that such claims be brought within the framework of the action under Section 3730(a) or (b) for a substantive violation of the Act. If an employee uncovered a false claim three years after it was made and was promptly fired for exposing the employer, the employee would have had three years to file the *qui tam* action but could wait another three years (until nine years after the underlying fraud) to bring a retaliatory discharge claim. Congress presumably had no intent in allowing retaliation claims to be separated from the underlying *qui tam* action and filed years after both that action and the violation. Petitioners' proposal to apply state law limitations periods, starting at the time of the retaliation, would suffer from the same problem in some states.[5] On the other hand, Con-

[5] Some states have lengthy limitations periods for wrongful discharge claims, such as New Jersey's six-year period. See *Montells* v. *Haynes*, 627 A.2d 654, 659 (N.J. 1993) (six-year period of N.J. Stat. Ann. § 2A:14-1 (West 1987) applies to actions for economic loss, rather than personal injury, such as a wrongful-discharge cause of action allowing recovery of lost wages).

gress's adoption of a single statute of limitations period applicable both to an action brought by the Attorney General or a *qui tam* relator *and* a retaliation action is consistent with Congress's uniform application of the FCA's procedural provisions to all claims under Section 3730 and increases the likelihood that *qui tam* and retaliation claims would be resolved in the same litigation. See pp. 21-27, *infra*.

Petitioners correctly note (Br. 23) that a plaintiff may have an actionable claim of retaliation "even when there has been no violation of Section 3729." See Senate Report 35 ("[T]he employer would not have to be proven in violation of the False Claims Act in order for this section to protect the employee's actions."). Petitioners point out that the six-year limitations period in Section 3731(b)(1) begins to run from "the date on which the violation of section 3729 was committed," and then argue that because a retaliation action does not depend on an actual violation of Section 3729, retaliation "claims will never be time-barred" under Section 3731(b)(1). See Pet. Br. 22-23. That argument is clearly mistaken. Under petitioners' strained reading, a defendant moving to dismiss even an action under Section 3730(a) or (b) action would likewise first have to prove that a "violation of Section 3729 was committed" before it could successfully move to dismiss on statute of limitations grounds. Plainly, that is not the law.

3. Petitioners' reliance on the alternative limitations period in Section 3731(b)(2) is also misplaced. Subsection (b)(2) provides that an action under Section 3730 is timely if it is brought within:

> 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more

than 10 years after the date on which the violation is committed.

31 U.S.C. 3731(b)(2). Petitioners contend that because there is no "official of the United States charged with responsibility to act" in retaliation cases, Congress could not have intended retaliation claims to come within Section 3731(b) at all. Pet. Br. 10-11. That argument is, too, mistaken.

In essence, petitioners argue that if a particular type of claim would not be covered by Section 3731(b)(2), then, by implication, that type of claim is also excluded from the reach of Section 3731(b)(1). That argument, however, proves too much and suffers the same defect as their Section 3731(c) argument. See pp. 13-14, *supra*. Following petitioners' logic, a *qui tam* action pursuant to Section 3730(b) would also be impliedly excluded from the scope of Section 3731(b): Under the logic of petitioners' argument, because the private employee who learns of the fraud is not an "official of the United States," a *qui tam* suit by that individual is excluded from Section 3731(b)(2), and a *qui tam* claim is therefore *also* impliedly excluded from the scope of Section 3731(b)(1)). But even petitioners disavow such a conclusion. See Pet. Br. 4 ("Section 3731(b) * * * establishes a limitations period for an action * * * under section 3730(a) and * * * under section 3730(b).").[6]

[6] It is not clear that the first two steps in petitioners' syllogism are correct either. First, the lower courts are divided on the meaning of the phrase "official of the United States" in 31 U.S.C. 3731(b)(2). At least two district courts have held, as petitioners contend, that a private employee is not an "official of the United States" when suing as a qui tam relator. See *United States ex rel. Amin* v. *George Washington Univ.*, 26 F. Supp. 2d 162, 170-73 (D.D.C. 1998); *United States ex rel. Thistlethwaite* v. *Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998). On that basis, those courts have held that a qui tam action is not timely under Section 3731(b)(2) if brought within three years of the employee's discovery of the fraud. In contrast, the Ninth Circuit has held that such an employee is an "official of the United States" when suing as a relator because Section 3730(b) authorizes the individual to bring suit on behalf of the United States. See *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1217 & n.8 (9th Cir. 1996).

Second, even if a private employee is not regarded as an "official of the United States" when serving as a qui tam relator, it does not follow that Section 3731(b)(2) is wholly inapplicable to suits by a relator. Section 3731(b)(2) provides an alternative limitations period that is triggered by the date on which someone who is an "official of the United States" knows or has reason to know of facts material to the right of action. If that condition is satisfied, then by the terms of Section 3731(b)(2), it would appear that an action for a violation of Section 3729 could be brought within three years by either the Attorney General or the relator. See *United States ex rel. Colunga* v. *Hercules*, No. 89-CV-954B, 1998 WL 310481 (D. Utah Mar. 6, 1998). Similarly, if the six-year limitations period for a violation of Section 3729 is extended by Section 3731(b)(2) because of the date on which an official of the United States first knew or had reason to know of the violation, that extended limitations period should apply equally to a retaliation action under Section 3730(h).

4. Petitioners also urge the Court to adopt a narrowing construction of Section 3731(b) in order to conform the text to what petitioners believe was Congress's intent, as reflected in the 1986 FCA Amendments' legislative history. Pet. Br. 18-21. It is well settled, however, that the Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). In any event, petitioners' argument from legislative history is mistaken. To the extent that history is relevant, it confirms that Section 3731(b) means what it says. See *Connecticut Nat'l Bank*, 503 U.S. at 254.

Petitioners' legislative history argument begins from the mistaken factual premise that "the original drafts of the House and Senate bills to amend the False Claims Act set out the retaliatory discharge provisions as a separate section of the statute (to be codified at 31 U.S.C. § 3734)." Pet. Br. 18. From that faulty premise, petitioners draw the incorrect conclusion that when Congress "moved [the retaliation provision] into 31 U.S.C. § 3730," the failure to amend Section 3731(b) to reflect that change was a mere oversight. Pet. Br. 21.

Such speculation in light of unambiguous text is *legally* irrelevant. See, *e.g.*, *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004). Petitioners' recounting of the history of the 1986 amendments, moreover, contains a significant *factual* error. In the earliest versions of what became the FCA Amendments, Congress placed the retaliation cause of action *within* section 3730. See S. 1562, 99th Cong., 1st Sess. § 4 (Aug. 1, 1985) (original Senate bill, proposing retaliation provision as Section 3730(e)); H.R. 3317, 99th Cong., 1st Sess. § 4 (Sept. 17, 1985) (original House bill, proposing retaliation provision as Section 3730(e)). Moreover, neither of those original bills proposed amending the statute of limitations provision in Section 3731(b), which, prior to the 1986 amendments, provided: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. 3731(b) (1982). Even under these early bills, therefore, the retaliation provision that became Section 3730(h) would have come within the scope of Section 3731(b)'s statute of limitation.

Petitioners are correct that the Senate version of the bill was later revised to move the retaliation provision to a proposed Section 3734. Senate Report 34-35. But the House version of the bill was never modified in that manner. See H.R. 4827, 99th Cong., 2d Sess. § 4 (May 15, 1986); 132 Cong. Rec. 22,332 (Sept. 9, 1986). And, with respect to the retaliation provision, it was the *House* version of the bill, both in substance and placement, that Congress ultimately enacted into law. Compare Pub. L. No. 99-562, § 4, 100 Stat. 3157-3158, with House Report 4 and with Senate Report 34-35. See 132 Cong. Rec. 28,570-28,571, 28,576 (Oct. 3, 1986) (Senate adopting amendment to House version that retained substance of House's retaliation provision and its placement within Section 3730).

Thus, to the extent the legislative history of the 1986 amendments is at all relevant to the Court's inquiry, it indicates that the placement of the retaliation provision in a new

subsection of Section 3730 was not the product of a last-minute switch that might have led Congress to overlook the consequence of bringing it under the FCA's statute of limitations.[7] In any event, what the legislative history of the FCA indisputably does show is that Congress considered a proposal to put the FCA's retaliation cause of action in a separate section, where there would have been no statute of limitations directly applicable to it, but rejected that approach in favor of placing the provision with the FCA's other causes of action within Section 3730, which by the terms of the FCA made it subject to the same rules (including the same statute of limitations) that govern other actions under that Section. Nothing in the legislative history suggests that Congress did not intend what the text of the FCA clearly provides as a result of that choice.

B. A Uniform Limitations Period For All Actions Under Section 3730 Advances Congress's Purposes In The False Claims Act.

Petitioners' argument is, at heart, less that Section 3731(b) *cannot* be applied by its terms to retaliation claims under Section 3730(h), than that, for various reasons of public policy, it *should not* be applied to retaliation claims. Petitioners contend that to provide a six-year limitations period for Section 3730(h) claims, running from the date of the violation of Section 3729, would be inconsistent with statutes of limitations generally and, more particularly, at odds with

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[7] The language of Section 3730(h) provides further evidence that the placement of the retaliation provision within Section 3730 was not an oversight. Section 3730(h) refers to retaliation by an employer based on "lawful acts done by the employee * * * in furtherance of an action under this section, including investigation for * * * an action filed or to be filed under this section." (emphasis added). Those cross-references to actions under Section 3730(a) and (b) show that Section 3730(h) was fully integrated with those provisions. There accordingly is every reason to believe that Congress meant to fully integrate Section 3730(h) with those provisions for purposes of the statute of limitations as well, as the text of Section 3731(b) provides.

other limitations provisions governing retaliatory discharge claims. That argument ignores the unique nature of the FCA. The uniform limitations period provided by Section 3731(b) for all claims under Section 3730 serves the purposes of the FCA, whereas application of other statutes of limitation would frustrate those purposes.

Congress understood well the close relationship between *qui tam* claims and retaliatory discharge claims. As noted above, Congress specifically located the FCA's retaliation provision within Section 3730, with the *qui tam* provision, and limited the prohibition on retaliation claims to ones based on acts taken "in furtherance of an action under this section." 31 U.S.C. 3730(h). In fact, in the House Report, the discussion of the retaliation provision is located under the heading "*QUI TAM* ACTIONS." House Report 22-23. Moreover, as is evident from Congress's establishment of uniform jurisdictional and procedural rules for all "action[s] under section 3730," 31 U.S.C. 3731(a), (b) and (c); 31 U.S.C. 3732(a) and (b), Congress expected that retaliation claims would typically be litigated together with the underlying *qui tam* suit—an expectation that is fully borne out by experience.

In addition to general interests of judicial economy, litigating retaliation and *qui tam* actions together also serves interests particular to the FCA. Because a relator may remain an active participant in a *qui tam* action in which the United States has intervened and assumed primary responsibility for its prosecution, the FCA gives the court special authority to manage the discovery process and thereby ensure that the private individual does not unduly interfere with the government's development of its case. See 31 U.S.C. 3730(c)(2)(C). That type of management coordination would be significantly hampered if the relator's retaliatory discharge claim were proceeding independently of the action under Section 3730(b).

Another important feature of the FCA is that it enables the government to investigate the allegations of fraud before the defendant is aware that it is a target. For instance, the FCA requires that a *qui tam* relator must, simultaneously with filing the complaint under seal, serve a copy on the government, together with a "written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. 3730(b)(2). The government then has 60 days, which can be extended, to investigate and to decide whether to intervene in the case. 31 U.S.C. 3730(b)(2) and (3). For similar reasons, the FCA requires that, in order to avoid the general jurisdictional bar against *qui tam* suits that are based on already publicly disclosed information, 31 U.S.C. 3730(e)(4)(A), a relator must show that she had "voluntarily provided the information to the Government," 31 U.S.C. 3730(e)(4)(B), in order to permit the government an opportunity to investigate the allegations.[8]

The short limitations periods for wrongful discharge claims under many state laws and other federal statutes would frustrate these purposes. As the six-year limitations provision in Section 3730(b)(1) reflects, Congress understood that, because of the complexity of many Section 3729 violations, it could often take a relatively long time for the government or the relator to discover the possible fraud and then investigate it and prepare to sue. And when the limitations period is extended beyond six years, Congress still allowed three years after the discovery of the fraud to prepare an FCA complaint. See 31 U.S.C. 3731(b)(2) (requiring claims to be brought within "3 years after the date when facts material to the right of action are known"). Because

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[8] The facts alleged in this case exemplify the cooperative approach that the FCA envisions. According to the complaint, respondent reported the allegations of fraud to agents of the USDA OIG, assisted them with their investigation, and refrained from filing a qui tam action until after that investigation was completed without the filing of an FCA claim by the government. J.A. 26-27.

many acts of retaliation will take place soon after a potential relator first suspects and inquires into possible fraud, a short limitations period for retaliation claims would force the employee either to severely truncate her investigation of the fraud claim, so that she could file the two claims together, or to sever the claims and file the retaliation claim first. Some States' analogous limitations periods are as short as 90 days. *E.g.*, *United States ex rel. Hinden*, v. *UNC/Lear Servs., Inc.*, No. Civ. 02-00107 ACK/BMK, 2005 WL 639679, *5-*6 (D. Haw. Mar. 15, 2005) (holding FCA retaliation claim under Section 3730(h) time-barred pursuant to 90-day limitations period of the Hawaii Whistleblowers' Protection Act); *United States ex rel. Tillson* v. *Lockheed Martin Energy Sys., Inc.*, No. Civ. A 5:00CV-39-M & 5:99CV-170-M, 2004 WL 2403114 (W.D. Ky. Sept. 30, 2004) (declining to apply Kentucky's 90-day limitations period for whistleblower actions to claim of retaliation claim under Section 3730(h) in favor of six-year period in Section 3731(b)(1)). Other States also have very short statutory periods for some whistleblower retaliation actions that a court might determine are applicable by analogy. Pet. App. 24a-25a (citing 180-day limitations provisions for certain retaliatory discharge claims under Texas and Ohio law).[9] It may, however, often be exceedingly difficult to prepare a *qui tam* complaint in a complex defense contractor case within 180 days of when the employee was retaliated against. State wrongful discharge periods may, in fact, be so short precisely because a wrongful discharge claim, standing alone, is not particularly difficult to prepare. Indeed, many statutes provide for such an action to be initiated by an informal complaint to an administrative body.[10] Short statutes of limitation applicable to such complaints are not suited to the FCA, in which the retaliation claimant must prepare a formal judicial complaint that in many cases also will include a related *qui tam* claim.

The consequence of the position advanced by petitioners therefore may be that relators would split their retaliation and *qui tam* claims, or perhaps not bring them at all, thereby undermining the purposes of the FCA. If the relator does try to pursue both claims separately, prior disclosure of her allegations in the retaliation suit would undermine the enforcement mechanisms of the FCA. Disclosure of the relator's fraud allegations and the potential false claims suit before the United States has had an opportunity to conduct its own investigation would frustrate the purpose of the FCA's requirement that a *qui tam* complaint initially be filed under seal. Moreover, because the allegations of fraud will have been disclosed in the wrongful discharge action, questions would arise as to whether the employee is then barred from even pursuing a *qui tam* action because of the FCA's public disclosure rule. See 31 U.S.C. 3730(e)(4)(A) (barring *qui tam* action where allegations of fraud have been disclosed in a prior civil hearing); *United States ex rel. King* v. *Hillcrest*

[9] Florida likewise has a short 180-day limitations periods for analogous retaliation claims. See Fla. Stat. Ann. § 68.088 (West 1997) (person retaliated against in connection with a state FCA activity "shall have a cause of action under Section 112.3187"); *id.* § 112.3187(8)(c) (1997 & Supp. 2005) (a claimant "may, after exhausting all available contractual or administrative remedies, bring a civil action in any court of competent jurisdiction within 180 days"). As Florida is the State with the fourth largest volume of defense contracts in the nation, its statute would be particularly important if the Court were to adopt petitioners' arguments in favor of state law limitations periods. See http://www.eflorida.com/keysectors/homelandsecurity/hls.asp?level1=22&level2=142&level3=370&region=tb. Cf. NDIA Br. 17-18 (listing other States with heavy concentrations of government contractors, but omitting Florida).

[10] The Senate Report indicates that, in enacting Section 3730(h), Congress was "guided by" the whistleblower provisions in eight earlier federal statutes. See Senate Report 33. Petitioners emphasize that the longest limitations provision in any of those statutes is 180 days, and seven of the eight allow only 30 days. Pet. Br. 15-16. Those examples, however, are of limited relevance in determining the limitations period applicable to claims under Section 3730(h). Unlike Section 3730(h), each of the whistleblower statutes cited in the legislative history provides that retaliation claims are to be handled by an administrative process in the first instance.

Health Ctr., 264 F.3d 1271 (10th Cir. 2001) (prior wrongful discharge action constituted a "public disclosure" that barred a later *qui tam* suit on behalf of the United States by the same plaintiff), cert. denied, 535 U.S. 905 (2002).[11] In practice, then, petitioners' rule would frequently force employees to choose between filing a retaliation claim alone and filing a premature *qui tam* action.

Congress could have drafted elaborate provisions in an attempt to address these competing incentives. Instead, it chose a simpler approach by making retaliation claims subject to the same limitations rules that govern *qui tam* claims. See 31 U.S.C. 3731(b). Relators therefore have no incentive to bring retaliation claims independent of their underlying *qui tam* claims or to rush their *qui tam* claim to court prematurely.

Moreover, a uniform limitations period for all FCA claims offers the benefit of certainty: *all* claims under the False Claims Act, regardless of the jurisdiction in which the action is brought, are subject to a minimum limitations period of six years under Section 3731(b). There are obvious benefits to such a clear rule, not the least of which is avoiding threshold litigation over which State's limitations periods apply and which of that jurisdiction's provisions is the most closely analogous to a Section 3730(h) retaliation action. See *Jones* v. *R.R. Donnelley & Sons*, 124 S. Ct. 1836, 1842-1843 (2004).[12] In light of Congress's explicit purpose in the 1986 FCA

[11] A relator in such a circumstance might contend that she was the "original source" of the fraud allegations, and thus that the bar against qui tam suits based on publicly disclosed allegations does not apply. See 31 U.S.C. 3730(e)(4)(B). The scope and application of the "original source" exception in turn would create their own uncertainty.

[12] The difficulty of such an endeavor is exemplified by the contradictory assertions of the various courts and amici with respect to the most analogous state limitations periods. Compare NDIA Br. 18 (Florida, unknown; Utah, 1 year; Ohio, 4 years; Texas 2 years); EEAC Br. 17-18 (Florida, 4 years; Utah, 4 years; Ohio, less than 4 years); Pet. App. 24a-25a (Ohio, 180 days; Texas, 180 days); note 9, *supra* (Florida, 180 days).

Amendments to encourage private enforcement of the FCA, see Senate Report 23-24, it understandably chose to adopt a uniform limitations period for all FCA claims, thereby avoiding ambiguity in the applicable limitations period that might deter employees from filing retaliation claims—or even from coming forward at all.[13]

C. The Purportedly Absurd Consequences Petitioners Describe Are Both Hypothetical And Avoidable.

1. Notwithstanding the plain text of the FCA and the evident advantages of a uniform limitations rule for all FCA claims, petitioners argue that Congress could not have intended Section 3731(b) to embrace retaliation claims because, in their view, it would lead to "absurd" results. Petitioners point out that because the limitations period under Section 3731(b)(1) begins to run on the date of the violation of Section 3729, not the date of the retaliatory conduct itself, the six-year period under Section 3731(b)(1) could conceivably expire before the retaliatory acts themselves occur.[14]

Tellingly, however, petitioners and their amici cite only hypothetical examples of such instances, and they do not cite a single case in which such a result has occurred in the

[13] Although petitioners contend (Br. 17) that Congress could not have intended the six-year limitations period to apply to a retaliation action under Section 3730(h) because six years is too long for employment related claims, this Court has recognized that "six years[] is not long enough to frustrate the interest in a 'relatively rapid disposition of labor disputes.'" *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 36 (1995) (citation omitted).

[14] Petitioners cite decisions of this Court to the effect that "[a]ll statutes of limitations begin to run when the right of action is complete." *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875); *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997). That is, indeed, the "standard rule" where, for example, Congress states that the limitations period starts to run when "the cause of action arose." *Ibid.* (quoting 29 U.S.C. 1451(f)(1)). But the Court has also made clear that the "standard rule" does not apply if there is a statutory "indication that Congress intended to depart from the general rule." *Ibid.* Here, the text of Section 3731(b) provides an express "indication" of such intent.

nearly two decades that have passed since Congress enacted the FCA Amendments. See Pet. Br. 22-25; NDIA Br. 10-13; EEAC Br. 12-14. Nor is the United States aware of any such example. Surely something more than hypothetical absurdity is required before a clear statutory provision will be discarded. Even if some isolated examples of such instances eventually emerge, their relative rarity demonstrates that the purportedly absurd consequences for potential plaintiffs of which petitioners and the amici FCA defendant organizations are so solicitous may have been appropriately discounted by Congress. Congress is entitled to address itself chiefly to the types of cases that will in the main arise and may appropriately choose clarity and administrability over competing concerns that may arise only in a small number of cases. Cf. *Lamie*, 540 U.S. at 537 (rejecting an absurdity challenge to the plain meaning of a statute in light of the "apparent sound functioning of the [statutory regime] under the plain meaning approach").

2. Finally, as the court of appeals observed, if cases should arise in which the six-year period in Section 3731(b) expires before the employer commits a retaliatory act, traditional principles of equity could be interposed to prevent the cause of action under Section 3730(h) from being time-barred. See Pet. App. 20a-21a; *Neal* v. *Honeywell, Inc.*, 33 F.3d 860, 866 (7th Cir. 1994).

For example, a court could consider whether an employer who sought in bad faith to deny a whistleblowing employee the benefit of Section 3730(h) by purposefully waiting until the limitations period expired to exact revenge, should be barred from relying on the statute of limitations. *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (observing that the doctrine that "no man may take advantage of his own wrong" "has frequently been employed to bar inequitable reliance on statutes of limitations"); *Schroeder* v. *Young*, 161 U.S. 334, 344 (1896) (defendant was "estopped to

insist upon the statutory period" because his conduct had "lulled" the plaintiff "into a false security").

Even without proof of such conduct by the employer, the running of the limitations period for a retaliation action could be deemed to be tolled upon the filing of an action by the Attorney General or a *qui tam* relator under Section 3730(a) or (b), just as the filing of a *qui tam* action automatically renders timely any subsequent intervention by the government, even if an independent action by the Attorney General would be time barred. See *Young* v. *United States*, 535 U.S. 43, 49 (2002) (limitations periods are "customarily subject to 'equitable tolling', * * * unless tolling would be 'inconsistent with the text of the relevant statute'") (citation omitted); *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 552-559 (1974) (claims of putative class members tolled during pendency of class certification because defendants were put on notice); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983). Under that approach, an action could thereafter be brought based on any retaliation against a relator or other employee subsequent to the filing of the *qui tam* complaint for testifying or otherwise assisting in the action while it is still in litigation. Alternatively, if a *qui tam* plaintiff is discharged upon the unsealing of a complaint after the period under Section 3731(b) has run, the court could allow the retaliation claim to relate back to the timely-filed *qui tam* action.

Contrary to the concerns of petitioners and their amici, the prospect of equitable tolling or similar principles being applied to particular FCA retaliation does not create "the prospect of perpetual liability" that "could bankrupt local governments." IMLA Br. 16-17. Of course, the prospect of any liability can be avoided by the simple expedient of refraining from retaliating, and the prospect of "perpetual" liability is foreclosed by the equitable roots of those doctrines. In any case in which an equitable doctrine is raised, the employer could invoke the doctrine of laches if the re-

taliation claim is not filed promptly after the discharge. The defendant's potential liability for back wages in such a situation would likely be less than in some applications of petitioners' theory, in which the discharged employee would, in some States, have up to four, or even six, years after the discharge to bring an FCA retaliation claim. Cf. NDIA Br. 17-18; EEAC Br. 17-18. Indeed, a notable aspect of petitioners' theory is that a retaliation claim could be brought no matter how far in the past the purported fraud had taken place. Under the statute Congress enacted, by contrast, if the employee undertakes an investigation after the time when a *qui tam* suit or action by the Attorney General would be untimely, any retaliation suit would also be untimely. Thus, the limitations period enacted by Congress in Section 3731(b) serves the combination of purposes of this unique statute far better than would the adoption of disparate state law analogues that petitioners urge.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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